SUPREME COURT OF THE UNITED STATES.

THE VILLAGE OF NORWOOD,
Appellant,

vs.

ELLEN R. BAKER.

No. 269.
Appeal from the Circuit Court of the United States, for the Southern District of Ohio.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This case was commenced in the Circuit Court of the United States for the Southern District of Ohio. It comes to the Supreme Court upon appeal from a decree below enjoining the collection of a special assessment levied upon the property of Ellen R. Baker for the purpose of paying the costs and expenses of condemnation for the opening and extension of a public highway through her lands.

The opinion of Judge Sage filed in the Circuit Court is printed on pages 26, 27 and 28 of the record.

The Village of Norwood, a municipal corporation duly organized under the laws of Ohio, and situated in a county containing a city of the first grade of the first class, by regular and complete proceedings under the statutory laws of Ohio, condemned and appropriated to the public use a certain strip through the lands of the complainant, fifty feet wide and three hundred feet long, for the opening and extension of Ivanhoe Avenue, previously known as Baker Street; and assessed the costs and expenses of said appropriation, duly consummated by proceedings in the Probate Court of Hamilton County, Ohio, upon other lands of the complainant bounding and abutting upon both sides of that part of the street or avenue so appropriated. The proceedings were originated in the Board of Improvements, as required by the municipal code of Ohio, and by said board recommended to Council. (See pages 14 and 15 of the printed record.) The original ordinance to condemn, No. 285, was passed October 19, 1891, and in Section 1 thereof declared the intention to condemn and actually appropriated the property described, and authorized the solicitor to apply to the courts for an inquiry and assessment of the compensation to be paid. Section 2 of said ordinance provided that "the cost and expense of the condemnation and appropriation of said property, including the compensation paid to the owners thereof, the cost of proceedings, the cost of advertising and all other costs, and the interest on bonds issued, if any, shall be assessed per front foot upon the property bounding and abutting on that part of Ivanhoe Avenue as condemned and appropriated herein, the assessments therefor to be payable in ten annual installments, if deferred, and the same collected as prescribed by law and in the assessing ordinance hereafter to be passed," and for the issuance of bonds. This is in conformity to

the requirements of Section 2264 R. S., which directs, among other things, that the lots and lands to be assessed should be determined by ordinance before the improvement is made. The items included in said ordinance and in the assessment thereafter levied are authorized by Section 2284 of the Revised Statutes of Ohio. This ordinance was duly posted (one copy at Ivanhoe) in six of the most public places in the corporation, the first publication having been made November 3, 1891. (Pages 16 and 17 of the printed record.) Upon the 5th day of December, 1891, pursuant to the provisions of said ordinance, an application to assess compensation was filed in the Probate Court of Hamilton County, Ohio, a court of competent jurisdiction under the laws of said state in such cases, in which the said property was fully described, and a notice was issued to the defendants, which notice also included a description of the property sought to be taken, and served upon them, including Ellen R. Baker, according to law. Upon the 14th day of March, 1892, the parties appeared voluntarily by their attorneys and submitted the case to a jury, having agreed upon the amount of the verdict to be returned, to wit, $2,000.00; and thereafter the court entered its final order or decree, and the amount of compensation was then paid in full for the land taken. (Pages 19, 20, 21 and 22 of the printed record.) The complainant, Ellen R. Baker (having notice by the publication of the ordinance to condemn and coming into the Probate Court thereunder), made no objection to the right of the village to proceed with the suit, nor did she deny the constitutionality of the Statutes of Ohio at that time, and the proceedings of the village were, in fact, in conformity thereto. She received and accepted the $2,000.00 awarded by the jury. (See agreed state-

ment, page 24 of the record.) It does not appear that at any time she, or anyone for her, ever protested, or even notified any of the village authorities of her dissatisfaction with the manner of assessment provided for in the original appropriating ordinance, upon which all subsequent proceedings were founded, until the filing of her bill in equity in this case. In fact, in our judgment, her conduct indicated acquiescence, and the municipality was suffered and encouraged to issue and sell bonds thereby to raise the funds with which to pay the costs and expenses of said appropriation, including her own compensation, which bonds the corporation has made no provision to pay except by the assessing ordinance, No. 366, passed May 2, 1892 (page 17 of the record), and it will have no funds out of which said bonds can be legally paid if the Circuit Court is sustained and said assessment is finally enjoined in this action. The testimony of William C. Baker (Record, page 25) discloses that this strip of ground so condemned was considered as a private street, but that it was used by the public without objection before any proceedings were taken to appropriate the same, and that a house had been built by him fronting thereon (on the driveway, as he called it). The complainant claimed her right to sue by injunction in the Federal court by virtue of Section 5848 of the Revised Statutes of Ohio.

ASSIGNMENT OF ERRORS.

The Village of Norwood assigns for error that the Circuit Court held the equities to be with the complainant, Ellen R. Baker, and enjoined the assessment on the ground that it was in conflict with the Constitution of the United

States; also that said Circuit Court refused to dismiss the bill of complaint, as required by the law and doctrine of estoppel. (See pages 30 and 31 of the record.)

THE COMPLAINT.

The complainant says (pages 5 and 6 of the record):

First—That said assessment is illegal and unconstitutional, and is in violation of the 5th Amendment of the Constitution of the United States, which provides "nor shall private property be taken for public use without just compensation."

Second—That it is in contravention of Section 1 of the 14th Amendment, which provides "nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Third—That said assessment is in violation of Section 19 of the Bill of Rights of the Constitution of Ohio, providing that "private property shall not be taken for public use without compensation therefor made in money, without deductions for benefits to any property of the owner."

We shall now discuss these propositions in their order. If this court believes them to be unsound it will then be unnecessary to consider the questions of estoppel argued in the closing pages of this brief, which counsel believe to be, in any event, a good defense.

ARGUMENT.

I.

We believe it to be well settled that the restrictions of the 5th Amendment to the Constitution of the United States do not have reference to the exercise of the right of

eminent domain by municipal corporations operating under charters from, and governed by the laws of one of the several states. That provision is intended solely as a limitation on the Federal Government and not on the authority of the states.

Barron v. Baltimore, 7 Pet. 243 (8:672).
Withers v. Buckley, 20 Howard, 84 (15:816).

II.

Has the complainant been deprived of her property "without due process of law"? Are the laws of Ohio relating to such assessments in contravention of Section 1 of the 14th Amendment? These enactments are found in Title XII (Municipal Code), Chapter IV, of the Revised Statutes of Ohio. Section 2263 provides that "when the corporation appropriates, or otherwise acquires, lots or lands for the purpose of laying off, opening, extending, straightening or widening a street, alley or other public highway, or is possessed of property which it desires to improve for street purposes, the Council *may* assess the costs and expenses of such appropriation or acquisition, and of the improvement, or of either, or of any part of either, upon the general tax list, in which case the same shall be assessed upon all the taxable real and personal property in the corporation."

Section 2264 provides that in the cases mentioned in Section 2263, "and in all cases where an improvement of any kind is made, . . . the Council *may decline* to assess the costs and expenses in the last section mentioned (2263), or any part thereof, or the costs and expenses of any part thereof of such improvement . . . on the general tax list, in which event such costs and expenses, or any part thereof which may not be so assessed on the

general tax list, shall be assessed by the Council on the abutting, and such adjacent and contiguous, or other benefited lots and lands in the corporation, either in proportion to the benefit which may result from the improvement, or according to the value of the property assessed, or by the foot front of the property bounding and abutting upon the improvement, as the Council by ordinance, setting forth specifically the lots and lands to be assessed, may determine before the improvement is made, and in the manner and subject to the restriction herein contained."

Section 2271 limits any such special assessment to 25 percent of the value of the land assessed, for all villages in the same class with Norwood, stipulates that the cost exceeding that percentum shall be paid by the corporation out of its general revenue, and provides that "whenever any street or avenue is opened, extended, straightened or widened the special assessment for the cost and expense, or any part thereof, shall be assessed *only on the lots and lands bounding and abutting on such part of such street or avenue so improved*, and that said special assessment shall not be, in any case, in excess of benefits."

In the case at bar complainant does not claim, nor has she ever claimed, that the assessment exceeds the benefits, nor is there any evidence tending to prove this as a fact. On the contrary, the testimony tends to show a benefit, although that question is not really brought in issue herein, except collaterally.

The Council of Norwood proceeded according to the plain directions of the statute and levied the assessment in the only permissible way thereunder. If the assessment exceeded 25 percent of the value of the property upon which it was levied after the improvement was made (street opened), or if it was in excess of benefits, the complainant

had a plain remedy by injunction, pursuant to the provisions of Section 5848 of the Revised Statutes of Ohio, which reads as follows: "Courts of Common Pleas and Superior Courts shall have jurisdiction to enjoin the illegal levy of taxes and assessments, or the collection of either, and of actions to recover back such taxes and assessments as have been collected, without regard to the amount thereof, but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected."

The complainant had the right to go into court with a petition alleging that the assessment charged against her was in excess of benefits derived from the street as opened and extended through her property, or even that she obtained no benefits whatever by reason of said improvement, and in this way, upon hearing, the assessment might either be reduced to the proper charge, as contemplated by Section 2289 of the Statutes of Ohio, or enjoined in its entirety, as the proof should warrant. In the case of Longworth v. The City of Cincinnati, reported in the 23d Weekly Law Bulletin, page 104, Judge Taft, then upon the Superior Bench, and now one of the Judges of the U. S. Circuit Court of Appeals, said: "I think that the learned Judge (referring to Judge Jackson in the Toledo case, found in the 36th Federal Reporter) overlooked the statutory provision under which this suit is brought, which enables every taxpayer to bring an action for an injunction against the collection of any tax or assessment which he claims to be illegal or unjust, without any allegation of inadequacy of legal remedy required by the rules of equitable procedure to justify relief by injunction. In this way the taxpayer can have his day in court." Judge Jackson, after his decision in the Toledo case, sustained a similar assessment to

the one herein contested in the case of Murdock v. The City of Cincinnati, reported in the 25th W. L. B., page 26, and again referred to in this brief.

It is well settled in Ohio that the statutory regulations for such condemnations and assessments as the one at bar and their observance secure to the property-owner and the taxpayer "due process of law."

Cleveland v. Wick, 18 O. S. page 303.
Krumberg v. Cincinnati, 29 O. S. page 69.
Caldwell v. The Village of Carthage, 49 O. S. page 334.

In the last named case, decided April 26, 1892, the Supreme Court say in the syllabus: "Where land is appropriated for a street improvement an assessment by the front foot of the property bounding and abutting upon the improvement to pay the costs thereof, without the passage, notice and publication of (such) preliminary resolution, as thus provided, will not thereby be a taking of property without due process of law in violation of Section 1 of the 14th Amendment of the Constitution of the United States."

In the statement of facts in that case, on page 335, it appears that the Village of Carthage, in order to widen Taylor Street, appropriated a strip of ground belonging to the plaintiff 33 feet wide, being the west side of Taylor Street for its entire length. To pay the costs and expenses of the appropriation a special assessment was levied by the foot front upon the lots and lands of the plaintiff bounding and abutting upon the improvement. In other words, a part of the lands of the plaintiff were taken and an assessment, for the amount of compensation allowed and other costs and expenses, was levied upon the remainder, exactly the same as in this case. There is not even any complaint

in the case at bar as to failure to pass a preliminary resolution or serve notice.

We quote the following from the opinion in Caldwell v. Carthage, *supra*, pages 348, 349, 350, which met with the unanimous concurrence of the judges of the Supreme Court of Ohio:

"Due process of law implies a due course of legal proceedings according to those rules and forms which have been established for the protection of private rights. If the validity of an assessment is called in question, an opportunity must have been given to resist it, either by allowing a hearing before the imposition thereof, or by providing for an appeal to a court of law afterwards. But as said in McMillan v. Anderson, 95 U. S. 37, it is not, and never has been, considered necessary to the validity of a tax that the party charged should have been present, or had an opportunity to be present, in some tribunal when he was assessed. In that case it was held that a statute which gives a person against whom taxes are assessed a right to enjoin their collection and have their validity judicially determined is due process of law, notwithstanding he is required, as in other injunction cases, to give security in advance. In Davidson v. New Orleans, 96 U. S. 97, it was said by Mr. Justice Miller: 'Whenever by the laws of a state, or by state authority, a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice with such notice to the person, or such proceeding in regard to the property, as is appropriate to the nature of the case, the judgment in such proceedings can not be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections. . . . It

is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the state, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case.' These principles have been reaffirmed in the opinion of Mr. Chief Justice Fuller, in Walston v. Nevin, 128 U. S. 578.

"The inquiry is suggested, What is the remedy by which, in Ohio, the property-owner may test the illegality of an assessment? By Section 5848 of the Revised Statutes 'Courts of Common Pleas and Superior Courts shall have jurisdiction to enjoin the illegal levy of taxes and assessments.' An opportunity is here afforded to establish the invalidity of the tax or assessment; and with such privilege, if judgment is rendered against the property-owner in the suit, it can not be properly said that his rights of property have been determined without due process of law or judicial investigation. Tone v. Columbus, 39 Ohio St. 301, 302; Stephan v. Daniels, 27 Ohio St. 536; Steese v. Oviatt, 24 Ohio St. 253. Between the passage of the condemnation and assessment ordinances and an advertisement of a tax sale ample time elapses, and ample notice of the proceedings to appropriate and assess is provided for, to enable the owner to go into court and contest the assessment by application for injunction.

"If the special assessments are not paid by the time stipulated in the ordinance providing for the same, they may be recovered by suit, or the lien therefor may be enforced in the name of the corporation against the property-owners. Revised Statutes, Secs. 2285, 2286, 2294. And in a suit to recover the assessment or to enforce the lien therefor the owner of the property assessed may set up in defense the illegality of the assessment. In Murdock v. Cincinnati, 25 Weekly Law Bulletin, 26, U. S. Circuit Court, S. D. O., it was said by Jackson, J.: 'It appears that the City of Cincinnati is now proceeding, by civil suit in the state courts against complainant, to collect the assessment in

question. To that suit complainant may interpose any and all defenses going either to the validity or regularity of such assessments. Such suit gives him a full opportunity to be heard and affords him the privilege of presenting every objection that can possibly be made, either under the Constitution of the United States, or under the Constitution and laws of Ohio, to the validity of the assessment. It can not be questioned that the judgment which may be rendered against complainant in said suit will constitute "due process of law." If the owner of assessed property may have the benefit of the law of the land or due process of law, in a suit against him by the corporation making the assessment, he may also have the benefit in a suit by himself against the corporation wherein the same questions can be determined.'"

If the complainant is afforded "due process of law" by the statutes and courts of Ohio, the provisions of the 14th Amendment are complied with by the state, and its instrumentality, the incorporated Village of Norwood.

This court has recently reviewed some of the principles concerned in the case at bar in three well-considered opinions, to wit:

Fallbrook Irrigation District v. Bradley, 164 U. S. 112.

The C. B. & Q. Ry. v. Chicago, 166 U. S. 226.

And especially

Bauman v. Ross, 167 U. S. 548.

The principle is asserted in this latter case, supported by many authorities, both State and Federal, which are comprehensibly reviewed, that, under the legislative power of taxation, an assessment may be levied upon a remainder of a tract after the condemnation of a part, on the principle of benefits derived by the owner from the existence of a

new street. This case turned upon the construction and constitutionality of an act of Congress providing for the condemnation of property for streets and highways within the District of Columbia. Section 11 of that act provides that "where the use of a part only of any parcel or tract of land shall be condemned, in such proceedings the jury in assessing damages therefor shall take into consideration the benefit that the purpose for which it is taken may be to the owner or owners of such tract or parcel by enhancing the value of the remainder of the same, and shall give their verdict accordingly, and the court may require in such case that the damages and the benefits shall be found and stated separately." Section 15 of that act provides for assessing and charging the amount awarded as damages one half upon the lands benefited and the other half upon the District of Columbia, and that the same jury which shall assess the damages caused by the opening of any highways or reservations, or part thereof, shall ascertain and determine what property is thereby benefited, and shall assess against each parcel which it shall find to be so benefited its proper proportional part of the damages. In this case this court quotes with approval Chief Justice Cranch in Chesapeake & Ohio Canal v. Key (1829), 3 Cranch C. C. 591, 601. "The benefits to be derived therefore may as well set off against the value of the land as against the damages, and we see no reason why the jury may not find the result in one entire sum." See Chesapeake & Ohio Canal v. The Union Bank of Georgetown (1830), 4 Cranch C. C. 75, 80. The same principle was followed by Chief Justice Waite, speaking for the Supreme Court in 1881, saying that the construction of a canal might confer benefits that would be a just compensation for the private property taken for its use. This court says, in Bauman v. Ross,

on page 574, consequently, when a part only of a parcel of land is taken for a highway the value of that part is not the sole measure of the compensation or damages to be paid to the owner, but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account; when, on the other hand, the part which he retains is especially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of a part of it are lessened. If for example, by the widening of a street the part which lies next the street, being the most valuable part of the land, is taken for the public use, and what was before in the rear becomes the front part and upon a wider street, and thereby of greater value than the whole was before, it is neither just in itself nor required by the constitution that the owner should be entitled both to receive the full value of the part taken and considered as front land, and to retain the increase of value in the back land which has been made front land and by the same taking.

The court finds that there is nothing in the act of Congress inconsistent with the Constitution. In the case at bar the complainant does not say that the assessment, otherwise levied in accordance with the Ohio Statute, is in excess of benefits.

There is no distinction in principle between a jury setting off benefits against damages or values, as contemplated by the act of Congress found to be valid in the case of Bauman v. Ross, and in allowing pay for the property taken without deduction for benefits and then levying an assessment to pay the cost and expense of such appropria-

tion in a sum not in excess of benefits conferred by the improvement. It is only a difference in method of procedure as provided by legislation. The complainant herein has never sought or pursued the plain remedy provided by the Statutes of Ohio, and it can not be said therefore that there has been any *action of the state courts* as to this assessment inconsistent with the 14th Amendment to the Constitution. The procedure and process of the Ohio statutory laws are adequate, but their protection has not been invoked. Compensation has been made and paid for the property taken from Ellen R. Baker for the public use and she has accepted the money with full knowledge of the fact that an assessment was to be placed upon her remaining property. If, by reason of the said improvement or opening of Ivanhoe Avenue, her other property has been benefited or increased in value to an amount equal to that assessment, she has been justly compensated, nothing has been taken away from her, and she is as well off as she ever was, and this question can be tried under the laws of the State of Ohio.

This is an assessment levied by the front foot and there has been no adjudication by the Council of the municipality as to benefits or values, and as to such condemnation assessments Council has no power to determine these questions. It is the province of the courts to do so, and cases under Section 5848 are frequent in Ohio.

In the case of the C. B. & Q. Ry. Co. v. Chicago, decided by this court during the October term of 1896, and reported in the 166th U. S., pages 226–259, this court says in the syllabus: "In a proceeding in a state court for the condemnation of private property for public use, the court having jurisdiction of the subject-matter and of the parties,

the judgment ought not to be held in violation of the due process of law enjoined by the 14th Amendment unless some rule of law was prescribed for the jury that was in absolute disregard of the right to just compensation;" and

in the opinion, Mr. Justice Harlan fully reviews some of the principles applicable to the questions here at issue. In that case only a nominal verdict was returned by the jury and under the state of facts presented in the record and discussed in the opinion, there being some mutual or reciprocal obligations between the city and the railroad company, the verdict of the jury was sustained and the judgment rendered thereupon affirmed.

In the case of the Fallbrook Irrigation District v. Bradley, 164 U. S. 113, this court affirms, in the syllabus, the doctrine in Davidson v. New Orleans, 96 U. S. 97, 104, that

"Whenever, by the laws of a state, or by state authority, a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming *or contesting* the charge thus imposed in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings can not be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

Also (from the syllabus in F. I. D. v. B.), "process of law is furnished, and equal protection of the law given in such proceedings when the course pursued for an assessment and collection of taxes is that customarily followed in the state, and when the party who may be charged in his property has an opportunity to be heard."

In the case of Spencer v. Merchant, 125 U. S. 345, the Supreme Court said:

"If the legislature provides for notice to and hearing of each proprietor at some stage of the proceedings upon the question of what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law."

In Pearson v. Yewdall, 95 U. S. 294, this court laid down the definition of "due process" to be that where ample provision is made in a State act for an inquiry as to damages before a competent court, and for a review of the proceedings of the court of original jurisdiction, upon appeal to the highest court of the State, this is due process of law within the meaning of that term as used in the Federal Constitution.

The complainant herein may apply, through the process of the laws of her state for an adjudication or ascertainment of the benefits to her remaining lands derived by her from the improvement, to wit: the opening and extension of Ivanhoe Avenue. If, upon hearing, the Ohio courts find that her benefits are equal in value to, or in excess of, the amount of the assessment, she has not been deprived of her property without compensation.

As to "compensation," this court says, in Bauman v. Ross, on page 574:

"The right of eminent domain, as was said by this court, speaking through the Chief Justice, in a recent case, is an offspring of political necessity and is inseparable from sovereignty unless denied to it by its fundamental law. It can not be exercised, except upon the condition that just compensation shall be made to the owner; and it is the duty of the state, in the conduct of the inquest upon which the compensation is ascertained, to see that it is just, not

merely to the individual whose property is taken, but to the public which is to pay for it."

In Searl v. Lake Co. School District, 133 U. S. 553, 562, appears this language:

"The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of and no more. To award him less would be unjust to him; to award him more would be unjust to the public."

See also the argument of Judge Welch, speaking for the Supreme Court of Ohio, in City of Cleveland v. Wick, 18 Ohio State, 307, reprinted in the following pages of this brief.

Nearly all other streets have been voluntarily dedicated by the owners. The plat shows other streets to be open and remainder of Ivanhoe Avenue to have been dedicated.

It is manifestly unjust that Mrs. Baker should compel her neighbors who have given their land to the public to also pay for her street in front of her own premises, at least until she shows in the manner provided by law therefor that such street is of no benefit to her other lands, or that the assessment exceeds the benefits. It is possible that one person may own all or nearly all the real estate within the municipal corporation, and if the principle advocated by the complainant should be carried to the extreme, the burden of taxation occasioned by the appropriation of private property for public purposes might be borne by four or five poor men for the benefit of one rich one, or the right of eminent domain would be a nullity. It is immaterial whether there be only one or fifty affected by the condemnation proceedings and the assessment; the Ohio laws

afford ample protection against "confiscation," for no assessment can be sustained in excess of benefits, or for more than 25 percent of the value of the property assessed.

The village should not be required to pay Ellen R. Baker twice, both in money and by causing a benefit or increase in the value of her remaining property, especially at the expense of others who had already given or dedicated the land for the street in front of their respective premises.

III.

Does said assessment conflict with Section 19 of the Bill of Rights of the Ohio Constitution? What is the duty of this court, with respect to this question? This is defined in the syllabus in the case of The Fallbrook Irrigation District v. Bradley, 164 U. S. 113, to be as follows:

"It is the duty of the Federal courts, in exercising jurisdiction as to questions arising under the state constitution, to be guided by and to follow the decisions of the highest court of the state, as to the construction of the statute, and as to whether, if so construed, it violates any provision of that constitution."

The Supreme Court of Ohio has spoken as to a similar assessment in the leading case, never modified nor reversed, of Cleveland v. Wick, 18 O. S. page 304. The syllabus is as follows: "An assessment upon lands fronting on a street to reimburse the amount of compensation paid the owner for his other land taken for the use of the street is authorized by the statute and is not in violation of the constitutional provision which guarantees to owners of land so taken a full compensation without deduction for benefits."

In discussing this section of the Ohio Constitution, Judge

Welch, speaking for the court in the Wick case, beginning on page 307, presents most excellent and logical reasons in support of such assessments from both a legal and equitable standpoint, as follows:

"If this tax was authorized by law, as soon as assessed it became a debt, and the mere delay to place it upon the duplicate, or to use other means for its collection, did not extinguish the debt. Counsel do not, perhaps, mean seriously to dispute this proposition. But they contend, with great earnestness and much ability, that the tax is not authorized by law. Is this latter position maintainable?

"It is not denied that the tax was assessed in conformity to the statute. But it is said that this statute is contrary to the Constitution, in so far, at least, as it imposes upon a party any assessment to reimburse the compensation paid for his own land. It thus does indirectly, it is said, what can not be done directly. It pays a price for the land and then takes it back. It accords the owner of land taken full compensation, 'without deduction for benefits,' but it immediately assesses him an equal amount for the same benefits. Thus, it is argued, the constitutional provision which guarantees to the owner of land taken a full compensation, 'without deduction for benefits,' is evaded or nullified because the same result is reached, whether the value of the benefits is deducted in the first instance, or is afterward reclaimed in the shape of an assessment; the only difference to the land-owner being the difference between two words, 'Assessment' and 'deduction.'

"But there are two provisions of the Constitution to be considered in connection with the question raised. One gives this power of condemnation with the restriction that it shall be exercised only upon payment of a full compensation. The other gives the power of taxation by 'assessment.' No matter if the latter power is given by mere implication (Art. 13, Sec. 6), or is only to be found in a general grant of legislative power, it is none the less cer-

tainly given, and is none the less sacredly to be maintained. Nothing is better settled under the provisions of the new Constitution than the existence of this power of local assessment. Hill v. Higdon, 5 Ohio St. 243; Reeves v. Treasurer, 8 *Ib.* 333; Zanesville v. Richards, 5 *Ib.* 589. It is a distinct and separate power, wholly independent of the provision as to condemnation of land for public uses, or the price which shall be paid the owner. If practicable we must so construe the Constitution as to leave both these provisions—that which guarantees a full compensation without deduction for benefits and that which gives the power of local taxation—standing in full force, each unintrenched upon by the other.

"It is not denied that at the time of the adoption of the present Constitution this power of local assessment existed to the extent claimed here. See 18 Ohio, 518; 1 Ohio St. 127. If it does not exist to the same extent now it is because it is limited by the provision in regard to compensation. The argument seems to be that it is so far limited by that provision as to deny the right to assess a party for that part of the cost of an improvement which consists of the price of his own land. But if the argument is good to that extent it is good for much more, and would, if carried to its legitimate result, practically defeat the whole power of local assessments. It would be impracticable to discriminate in making such assessments between the expenditure incurred in paying for the party's own land and the cost of other lands, or between the expenditure for his land and any other expenses of the improvement. And if it were practicable it would be manifestly unjust to the owners of other lands subject to assessment.

"Suppose a new street to be laid through the lands of A and B, taking an acre from each. Neither, it is said, can be taxed to pay for his own acre, but each can be taxed to pay for the acre of the other. What is the difference whether each is taxed for half the cost of two acres or for the whole of the cost of one acre. If there were ten pro-

prietors instead of two, the difference would be between one tenth of ten and one tenth of nine. If one of the ten happened unfortunately to abut on the street, so that none of his land was taken, he would have to pay for all the land taken from the nine, although they got full prices for their land 'irrespective of benefits' which they enjoy in common with him. One party might own nearly all the land benefited by the improvement, and yet, because a square rod of his land is taken and fully paid for, he goes scot-free, enjoying most of the benefits, and the whole burden falls upon the others. It is easy to see that no construction leading to such results can be admitted, and that if you deny the power to assess a party to pay for his own land you logically and necessarily deny the power to make any assessment for land taken.

"But the argument goes still further, and is, in effect, that you can not assess a party whose land is taken for any part of the cost of the improvement, whether for the price of land or for other expenses. The assessment, it is contended, is a kind of offset or equivalent for the benefit rendered by the improvement—a mode of deduction for benefits—and therefore you are forbidden to levy any assessment for the improvement against a party whose land has been taken. The Constitution guarantees him two things: (1) a full price for his land, and (2) that he shall be charged nothing for benefits. What benefits? The benefits from the whole improvement. The benefits are to him a unit, and you can no more assess him for one part of the expense than for another. If you assess him for the improvement, for any part of the expense, you assess him for the benefits. Counsel say that to 'assess' him for the benefits is the same as to 'deduct' them. As to him, 'deduction' and 'assessment' are convertible terms. Their reading of the provision in question is that a party whose land is taken for public use shall be paid a full compensation therefor without 'assessment for benefits.'

"If the argument is good for anything, it proves that no

assessment can be made, for any public improvement, against parties whose lands have been condemned for its use, and practically the whole power of local assessment is defeated by this provision.

"What was the object of the provision in question? What was the evil intended to be remedied by it? Surely it was no part of its object to remedy any supposed inequality or abuse of the power of local taxation. No such evil was complained of. The mischief which existed under the old Constitution was that the benefits which were common to his neighbors without charge were deducted from the price paid to the owner of land taken. The evil might well be denominated inequality of benefits and burdens among adjoining-land owners. You paid for the owner's land in privileges and left him still liable, equally with his neighbors whose lands were untaken, to any and all local assessments that might afterwards be imposed. This was unequal and therefore deemed unjust. Experience proved, moreover, that it led to much abuse of the power of condemnation. A full remedy is found for these evils in the provision in question without at all making it to interfere with the power of assessment. Construed thus, it is in perfect accordance with the leading principle of taxation in the new Constitution—uniformity and equality of burdens. It simply guarantees to the owner of land condemned a full price. When that is paid he stands on a perfect equality with all other owners of adjoining lands, equally liable, as he ought to be, to be taxed upon his other lands with them. He has the full price of his land in his pocket and is an equal participant with them in benefits to adjoining lands. To throw the whole burden upon the others in such a case would be to do them the precise injustice which was done to him under the old Constitution. To do so would be to avoid one evil only to run into another. It would be to avoid the evil of withholding from him a full and fair price for his lands only

to run into the equal evil of paying him two prices for it, the second price being at the expense of his neighbors.

"We think the assessment was legally made, and that the district court erred in holding otherwise."

See also Hart v. Lamphire (7: 679), 28 U. S., 280.

IV.

Estoppel.

Even if the Ohio Statutes authorizing such assessments as the one at bar be unconstitutional, which we deny, it is nevertheless too late for the complainant to urge want of power in the municipality to levy the same. Of course the complainant would have, and still has, the right to dispute the correctness of the assessment, the regularity of subsequent proceedings leading up to the same, or she may claim that it exceeds in amount the limitations allowed by law; but she can not be heard to absolutely deny the power of the municipality to make such an assessment. We maintain that by her failure to assert this claim at the proper time, and by her own conduct, she could not be permitted, at this late day, to have immunity from the lien connived at and invited by herself. After the report of the Board of Improvements and its preliminary recommendation, the first step taken with reference to the appropriation of the complainant's property was the passage by Council (the legislative body of the municipal corporation of Norwood) of Ordinance No. 285. (Page 16 of the record.) This ordinance provided in Section 2 for the assessment which was thereafter levied and which is in controversy in this case, and stipulated that bonds should be issued and sold in anticipation of the collection of the

same, the proceeds of which should be used only to pay the costs and expenses of said appropriation. All subsequent proceedings relating to said condemnation and assessment were founded upon this original ordinance, and upon its validity depended the jurisdiction of the Council and of the courts to proceed further. The passage of a valid and legal ordinance to condemn is a jurisdictional requirement. Section 2 of Ordinance No. 285 is an *essential part of it.* If it falls the entire ordinance is void *ab initio.* Section 2264 of the Revised Statutes of Ohio provides that the lots and lands to be assessed must be "designated in advance." If Section 2 is dropped out entirely, no other provision being made in the ordinance for the payment of the costs and expenses of the proposed condemnation, the inference follows that the same would be paid out of a fund raised by assessment "upon all the taxable real and personal property of the corporation." (Section 2263 Revised Statutes of Ohio.) Now, before any such method of payment could be legal, or condemnation valid, the clerk of the village must first certify that the money required therefor was actually in the treasury at the time to the credit of the proper fund. Section 2702 of the Revised Statutes of Ohio reads as follows:

"No contract, agreement or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or order for the appropriation or expenditure of money, be passed by the council or by any board or officer of a municipal corporation, unless the auditor of the corporation, and if there is no auditor, the clerk thereof, shall first certify that the money required for the contract, agreement or other obligation, or to pay the appropriation or expenditure, is in the treasury to the credit of the fund from which it is to be drawn, and not

appropriated for any other purpose, which certificate shall be filed and immediately recorded; and the sums so certified shall not thereafter be considered unappropriated until the corporation is discharged from the contract, agreement or obligation, or so long as the ordinance, resolution or order is in force; and all contracts, agreements or other obligations, and all ordinances, resolutions and orders entered into or passed contrary to the provisions of this section shall be void."

A complete transcript of the proceedings of Council and of the Probate Court of Hamilton County is a part of the testimony in this case, printed in full in the record. There is no certificate of the Clerk of any such character, none was ever made or filed, and it follows therefore that Ordinance No. 285 is void, unless Section 2 thereof is valid. The Ohio courts hold that Section 2702 applies to proceedings to condemn private property for street purposes where the compensation is to be paid from the corporation treasury, Rhodes, *et al.*, v. Toledo, 6 Ohio Circuit Court Reports, page 9; but not where the compensation is to be paid by the issue of bonds or other authorized evidence of indebtedness in anticipation of the collection of the assessment. Tyler v. Columbus, 6 Ohio Circuit Court Reports, page 224. To the same effect, 2d Weekly Law Bulletin, page 251, Ryan, *et al.*, v. Cincinnati; 3d Weekly Law Bulletin, page 843, Cincinnati v. McErlane.

But the complainant admits that she made no objection to the exercise of the right of condemnation (by the Village of Norwood, pursuant to Ordinance No. 285), and that she did not deny the constitutionality of the Statutes of Ohio authorizing such proceedings, and says that such proceedings were, in fact, in conformity to the Statutes of the State of Ohio. A consent verdict was had in the Pro-

bate Court of Hamilton County, and the sum of $2,000.00 was paid to complainant and accepted by her with full knowledge that it was to be met, together with the other costs and expenses incident to the appropriation, by an assessment upon her remaining lands.

Query: By admitting the proceedings to condemn to be in conformity to the Statutes of Ohio did she not confess to the validity, under the laws of said state, of original Ordinance No. 285? The assessment actually levied by Ordinance No. 366 (page 17 of the record) is admittedly in accordance with the provisions, and pursuant to the declarations, of Ordinance No. 285. Was it not the duty of the complainant, if she desired to oppose or contest Section 2 of Ordinance No. 285, either to proceed by answer and cross petition in the Probate Court after the filing of the application therein, or to bring an independent action to enjoin the proposed improvement before the issuance and sale of bonds? She had notice, not only by publication, but also by summons and actual appearance in court in response to the action of Council, and ample time between October 19, 1891, when the original ordinance was passed, and May 15, 1892, when the assessing ordinance, which also provided for the issuance of bonds, went into effect. What was complainant doing all this time? Remaining silent, appearing in the Probate Court by counsel, agreeing with the solicitor of the municipality upon the amount of the verdict to be awarded, submitting the same to the jury, permitting the assessing ordinance to be passed and providing for the sale of bonds (Section 3 of Ordinance No. 366), allowing the bonds to be advertised and sold, and then collecting the $2,000.00 from the village—all without a word of protest or objection, or assertion in the

courts or otherwise of any want of power upon the part of the municipality to levy the assessment, with which to raise the sinking fund to pay said bonds as they should mature. Has she not admitted away any right she may have had to challenge this assessment on the ground of unconstitutionality or want of power? Has not her acquiescence in, and her conduct relating to, the original ordinance and subsequent proceedings of the Council and Probate Court estopped her from seeking, in this action, to overthrow an assessment levied pursuant to the ordinance, the provisions and benefits of which were accepted by her to her profit and advantage? The proceedings of the village were recognized by complainant as legal and constitutional until after she had received the money for a street already open to travel, and upon which a house already fronted. They were not claimed to be invalid until she was called upon to pay the first installments of the assessment. The questions involved here are really in the nature of *res adjudicata*. This whole case turns as much upon the original ordinance to improve (No. 285) as upon the assesssment ordinance itself (No. 366); for the plan and intention of the one is only carried into actual effect and operation in the other. Ordinance No. 285 was sustained and proceedings had thereunder without objection, exception or appeal in the Probate Court of Hamilton County, Ohio—sustained, in fact, by the express consent of counsel. Such, at least, was the effect of the findings and judgment of that court, the jurisdiction of which in such cases is not here questioned, and the assessment was admittedly levied pursuant to the declarations and provisions of said Ordinance No. 285. In view of her conduct, her admissions and connivance, in order to secure the proposed improvement and

the money paid therefor, the complainant can not now be heard in denial of the power of the village (after it has proceeded in good faith and incurred the consequent obligations) to levy the assessment of which she had notice from the beginning. Until it came time to pay the first installment of the assessment, the complainant remained at times a "silent partner" and was at times an active participant in the proceedings. The Supreme Court of Ohio, in the case of Tone v. Columbus, 39 Ohio St., page 281, says in the syllabus:

"1. The principles of estoppel apply as well where proceedings of a corporation are questioned on the ground of the unconstitutionality of the statute under which they are had as where they are attacked upon other grounds, unless such proceedings, or what is sought to be accomplished by them, are *per se* illegal or *malum prohibitum*. Want of power in the corporation may be waived, or an estoppel may rise from failure to assert it at the proper time.

"2. The Act of March 30, 1875, under which the improvement of North High Street was made, having been declared unconstitutional (State, *ex rel.* v. Mitchell, 31 Ohio St. 592), such of the property-owners as petitioned for the privileges of the act, acted as officers of election or commissioners of the improvement, voted at the election for commissioners or actively participated in causing the improvement to be made are estopped from asserting such unconstitutionality.

"3. A petitioner for the privileges of the statute will be estopped to deny the power under it of the city to grant his petition, but the mere fact of the petitioning will not estop him from objecting that the subsequent proceedings of the city have been conducted in violation of the requirements of the statute.

"4. Such petitioner has the right to assume the per-

formance of its duty by the city council, which was, before acting upon the petition by ordering the improvement, to ascertain whether a sufficient number had signed to confer jurisdiction.

"5. Active participation in causing the improvement to be made will estop the party engaged therein from denying the validity of the assessment; but to create an estoppel from silence merely it must be shown that the owner had knowledge: 1. That the improvement was being made; 2. That it was intended to assess the cost thereof, or some part of it, upon his property; 3. That the infirmity or defect in the proceedings existed which he is to be estopped from asserting, and 4. It must appear that some special benefit accrued to his property from such improvement which it is inequitable, under the circumstances, he should enjoy without compensation.

"6. While such owner is presumed to know of the invalidity of the statute, a presumption of knowledge does not exist as to one who is silent merely with regard to the illegality of the proceedings of the council, or public officers, which he has the right to assume are regular until he has knowledge to the contrary."

That an abutting property owner, by an unmistakable assent to proceedings which are intended to charge his property with a proportionate part of the expense of a public improvement, or, by acts of approval or encouragement manifested during the progress of the work to those engaged in it, may waive a constitutional as well as a statutory objection to such proceedings; that silence may work an estoppel, and that a person may by his silence waive all the right to an injunction; are principles well sustained by authority.

(See citations by counsel in Tone v. Columbus, on page

293. Also City of Cincinnati v. Manns, 54 Ohio St., page 257.)

It seems reasonable to suggest, in any event, that if there was want of power to assess in the manner proposed by Ordinance No. 285, there was want of power to condemn under that ordinance, and that, for reasons herein stated more fully upon another page, that ordinance was void. If it was void, the subsequent proceedings thereunder were invalid, the village has not acquired legal title to the land taken, and the assessment should not be enjoined unless the complainant be required, as a condition precedent, to return the $2,000.00 paid to her as compensation, together with 6 percent interest from date of payment. The bonds have been drawing interest since June 15, 1892. We respectfully submit that the decision of the Circuit Court is not justified by the facts of this case, and that the same should be reversed.

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Of Counsel for the Appellant.